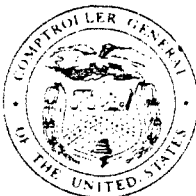


**DECISION**



*17047 17042*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

*[Protest of Army Award of Sole-Source Contract]*

FILE: B-199592

DATE: February 19, 1981

MATTER OF: R&E Cablevision

**DIGEST:**

1. Contracting officer acted in good faith throughout negotiation process; protester's objection to manner in which agency conducted negotiation is without merit.
2. Protest of cancellation of RFP filed with GAO more than 10 working days after protester first learned of cancellation is untimely and will not be considered on merits.
3. Sole-source award to incumbent cable television franchise holder was justified since incumbent was only source capable of meeting contracting agency's needs within required timeframe. Moreover, agency was justified in entering into 5-year contract with franchise holder in order to avoid a disruption in service.
4. Claim for proposal preparation costs is denied where award made to another firm was due to series of unforeseen circumstances rather than preconceived decision by contracting agency.

R&E Electronics, Inc. (R&E), doing business as R&E Cablevision, protests the sole-source award by the Department of the Army (Army) of a franchise agreement for a 5-year term to Daleville-Fort Rucker Cable Fund, Ltd. (Daleville), for a cable television (CATV) system at Fort Rucker, Alabama.

R&E argues that the sole-source award to Daleville, the incumbent franchise holder, was improper. However, for the reasons indicated below, we find no legal basis to question the award.

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FACTS

The United States Army Procurement Division, Fort Rucker, Alabama, issued request for proposals (RFP) No. DABT01-80-R-0016-1 on December 13, 1979, soliciting offers for CATV services to be furnished Fort Rucker for a 10-year period beginning on April 1, 1980, and continuing until March 31, 1990. The RFP fixed January 14, 1980, as the date for the receipt of initial proposals; however, amendment No. 0001 extended that date indefinitely. Amendment No. 0002, issued January 18, 1980, made some changes in the RFP and established January 29, 1980, as the new date for the receipt of proposals. On January 21, 1980, amendment No. 0003 was issued, making additional changes to the RFP. Finally, by January 29, 1980, six offers had been submitted in response to the RFP.

In early February, the Army made a technical review of the proposals. All were determined to be technically acceptable and the Army then conducted a preaward survey on the three low offerors--Cable Systems Design, Inc., R&E, and Synergenesis Corp.--with special emphasis placed on the RFP requirement that the CATV system be in full operation within 60 days after receipt of the Federal Communication Commission Certificate of Compliance. The preaward survey teams recommended award to Cable Systems Design, Inc., and Synergenesis Corp., but not to R&E because of its inability to meet the 60-day requirement for operation. About this same time, preaward surveys were conducted on Superior Satellite Co. and TeleNational Communications, Inc., which, like R&E, were also found to be unable to meet the 60-day requirement. No preaward survey was conducted on Daleville since it was the incumbent franchise holder.

Negotiations were held during March 1980. While this was going on, the Army signed a 3-month agreement with Daleville for the period April 1, 1980, to June 30, 1980, to ensure uninterrupted CATV service until the new 10-year agreement became effective. On March 26, 1980, amendment No. 0004 was issued, requesting best and final offers by April 8, 1980, and deleting the require-

ment for a Federal Communications Commission Certificate of Compliance (which had the effect of reducing the amount of time that the successful offeror would have to install its system and put it into operation).

Best and final offers were submitted by all firms except TeleNational Communications, Inc. On April 14, and 15, 1980, a technical evaluation board reviewed the best and final offers. In its findings, the board concluded that, despite certain weaknesses, Daleville's proposal was the most advantageous to the Government, followed by Cable Systems Design, Inc., R&E, Superior Satellite Co., and Synergenesis Corp. The contracting officer then made a determination to make the award to Daleville. However, upon reviewing this decision, a board of award did not concur. It believed that the 60-day construction requirement was restrictive and that adequate competition had not been obtained. In light of the board's finding, and after further consultation with the technical advisor, the contracting officer decided not to make the award to Daleville. Instead, on April 29, 1980, she issued amendment No. 0005, increasing the construction deadline from 60 to 180 days and establishing May 30, 1980, as the date for the receipt of new best and final offers.

Because of the delay encountered in awarding the 10-year agreement, the Army decided to negotiate another short-term agreement with Daleville for the period July 1, 1980, through January 31, 1981. Also, due to the delay, amendment No. 0006 was issued on May 2, 1980, changing the effective dates of the franchise agreement to February 1, 1981, through January 31, 1991.

At this point, the Army decided that the RFP should be canceled because competition had been restricted due to the 60-day requirement. It also believed cancellation was desirable due to the number of revisions that had been made in the original solicitation. Therefore, on May 23, 1980, amendment No. 0007 was issued, canceling the RFP and informing the offerors that they would be given an opportunity to compete on the resolicitation.

Meanwhile, the Army was continuing to negotiate a short-term agreement with Daleville which would allow it time to resolicit the 10-year franchise agreement. Daleville, however, was no longer interested in a short-term agreement. It now wanted a 5-year agreement negotiated on a sole-source basis without a termination for convenience clause. At first, the Army insisted that the longest term to which it could agree would be 1 year. As negotiations continued during the month of June 1980, Daleville continued to insist that business reasons dictated that only a 5-year agreement or longer would be practical and that it would terminate service on June 30 unless such an agreement was reached. Thus, the Army was faced with a disruption of its CATV service if it did not reach an agreement by June 30, 1980. After a number of negotiation sessions during which the Army was unsuccessful in bringing Daleville to accept a 1-year agreement, the Commanding Officer, Fort Rucker, authorized the execution of a franchise agreement on the grounds that continuous CATV service is "mission essential" for the base both for morale reasons and, in view of the impending hurricane season, because of the need to maintain telecommunications with the base population during disaster operations. In reliance on this directive, the Army signed a 5-year agreement with Daleville on June 30, 1980, without a standard termination for convenience clause. Notice of the agreement was sent to the other offerors, who were also notified that the resolicitation promised in amendment No. 0007 would no longer take place. Upon learning this, R&E filed a protest with our Office.

#### GROUND'S OF PROTEST

The grounds of R&E's protest can be summarized as follows:

- (1) criticism of specific actions taken by the Army during negotiations prior to cancellation of the RFP;
- (2) a protest against the cancellation of the RFP;

- (3) a protest against the sole-source award to Daleville; and
- (4) a request for proposal preparation costs.

#### Conduct of the Negotiations

R&E's objections to the manner in which the Army conducted negotiations are essentially disagreements with the contracting officer's exercise of her discretion. R&E believes that, on certain occasions, the contracting officer should have followed the recommendations of the various specialists and boards which took part in the procurement process. According to R&E, if this had been done, Cable Systems Design, Inc., would have been in line for the award, not Daleville, and the subsequent sole-source award to Daleville would have never occurred.

We find no evidence in the record that Cable Systems Design, Inc., would have received the award if the solicitation had not been canceled. Both that firm and Daleville seem to have been in line for a possible award. Be that as it may, R&E has not made any showing that the contracting officer acted unreasonably or abused her discretion. Rather, the record indicates that the contracting officer acted in good faith throughout the negotiation process and was receptive to the recommendations made by her various specialists and boards. Therefore, we believe that the contracting officer acted within her discretionary authority.

#### Cancellation

The RFP was canceled on May 23, 1980, but R&E did not file its protest with our Office until July 14, 1980. Under our Bid Protest Procedures, a protest must be filed with our Office not later than 10 working days after "the basis of the protest is known or should have been known, whichever is earlier." 4 C.F.R. § 20.2(b)(2) (1980). Thus, R&E's protest against the cancellation is untimely and not for consideration on the merits.

SOLE-SOURCE AWARD

Sole-source procurements are authorized under 10 U.S.C. § 2304(a)(10) (1976) and Defense Acquisition Regulation § 3-210 (1976 ed.). Because of the requirement for maximum practical competition in the conduct of Government procurements, agency decisions to procure sole source must be adequately justified and are subject to close scrutiny. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402. Such decisions, however, will be upheld if there is a reasonable basis for them. Winslow Associates, 53 Comp. Gen. 478 (1974), 74-1 CPD 14. In this connection, we note that a sole-source award may be justified if time is of the essence and only one known source can meet the Government's need within the required timeframe. Design and Evaluation, Inc., B-193128, June 28, 1979, 79-1 CPD 466. We apply these standards in this case. Teleprompter of San Bernadino, B-191336, July 30, 1979, 79-2 CPD 61.

By the time the Army attempted to enter into a 1-year extension of the franchise agreement, Daleville was the only company that could provide Fort Rucker with the "mission essential" uninterrupted CATV service. As noted above, Daleville refused to accept a contract for a period shorter than 5 years. Thus, to avoid a disruption in service, the Army believed that it had to enter into a 5-year sole-source contract with Daleville.

It may be that Daleville may have capitulated if the Army had refused to agree to the 5-year contract. On the other hand, we cannot say that the Army's fears were unreasonable or unjustified under the circumstances.

Clearly, the Army would not have been faced with this predicament if more time had been allowed for conducting the procurement. Nevertheless, even though the Army's own actions contributed to the critical situation that ultimately required a sole-source award to Daleville, that did not preclude the Army from using the sole-source exception when that became necessary to relieve the critical situation. See Alton Iron Works, Inc., B-179212, March 6, 1974, 74-1 CPD 121. In short, we cannot conclude

that the sole-source award to Daleville was contrary to law or otherwise improper. However, the Army states that in order to avoid this problem in the future, it will have CATV solicitations issued 1 year prior to the termination of the current franchise agreements.

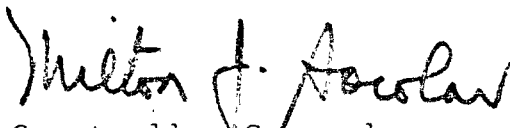
Protest denied.

PROPOSAL PREPARATION COSTS

R&E requests that it be reimbursed the cost of preparing its proposal on the basis that its offer and those of the other CATV firms were treated in an arbitrary and capricious manner since the award to Daleville was no more than a "rubber stamp transaction."

Proposal preparation costs can be recovered only if the Government acts in an arbitrary or capricious manner with respect to a proposal. Spacesaver Systems, Inc., B-197174, August 25, 1980, 80-2 CPD 146. In addition, the rejected offeror must have otherwise been in line for the award. Prototype Development Associates, Inc.-- Reconsideration, B-193595, September 22, 1980, 80-2 CPD 214.

Here, there is no indication that the contracting officer acted in bad faith, and the award to Daleville appears to be due to a series of unforeseen circumstances rather than to a preconceived decision by the Army. Therefore, we do not believe that R&E is entitled to proposal preparation costs.

  
For the Comptroller General  
of the United States